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## Article

# THE CLEAN ENERGY INCENTIVE PROGRAM: A WITHDRAWN INVITATION TO TECHNOLOGICAL INNOVATION AND MARKET TRANSFORMATION IN THE ELECTRIC ENERGY INDUSTRY†

Michael A. Mullett\*

### I. INTRODUCTION

Global climate change is perhaps the most challenging, complex, and controversial issue to face humanity since the dawn of the nuclear age at the conclusion of World War II in 1945.<sup>1</sup> It also proved to be one of the

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† This is an Addendum to an article published by author Michael A. Mullett in Valparaiso University Law Review Volume 51. See Michael A. Mullett, *The Clean Energy Incentive Program: A (Stayed) Invitation to Technological Innovation and Market Transformation in the Electric Energy Industry*, 51 VAL. U. L. REV. 405 (2017). The original article was submitted for editing prior to the November 2016 Presidential election and its content was not modified based on the results of the election, which dramatically changed the direction of American national policy with respect to climate change when the Trump Administration succeeded the Obama Administration in January 2017. Notably, this dramatic change was reflected in the Trump Administration's actions to withdraw the commitments made by former President Obama at the Paris Climate Change Conference, rescind the Obama Administration's Clean Power Plan Final Rule, and withdraw the Obama Administration's Clean Energy Incentive Program Proposed Rule. Accordingly, this Addendum is intended to describe and analyze the Trump Administration's dramatic shift in American national policy as it affected the Obama Administration's Proposed Rule for the Clean Energy Incentive Program as previously described and analyzed in the author's previously published Volume 51 article.

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<sup>1</sup> See Brian Kahn, *Obama Just Tied Climate Change to National Security*, CLIMATE CHANGE (Sept. 22, 2016), <http://www.climatecentral.org/news/obama-climate-change-national->

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most contested issues in the 2016 Presidential elections, especially in relation to the commitments that former President Barack Obama had made on behalf of the United States at the November 2015 Paris, France, Climate Change Conference to reduce American emissions to Earth's atmosphere of carbon dioxide ("CO<sub>2</sub>") ("Paris Commitments") and the executive actions which the Obama Administration had initiated to honor the Paris Commitments.<sup>2</sup> As a practical matter, this issue revolved around the stated intention of Republican candidate Donald Trump, if elected President, to rescind rather than continue to develop and implement the Clean Power Plan (CPP) announced in August 2015 and promulgated in October 2015 by the Obama Administration on the eve of the Paris Conference.<sup>3</sup> Of most immediate importance in this context was the question of whether the 45th President of the United States would abandon his predecessor's proposal for "early action" to achieve Clean Power Plan CO<sub>2</sub> emissions reduction goals through that Plan's Clean Energy Incentive Program (CEIP).<sup>4</sup>

This Addendum summarizes the status of the Paris Commitments, the CPP, and the CEIP as they stood at the time former President Obama left office on January 20, 2017.<sup>5</sup> It then describes and analyzes the actions which the Trump Administration has taken since its inauguration to cancel the commitments made by former President Obama at the Paris Conference, rescind the Clean Power Plan Final Rule announced in

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security-20723 [https://perma.cc/TH8G-GSAK] (describing the seriousness of climate change throughout the world).

<sup>2</sup> See, e.g., Chris Mooney, *The U.S. and China Just Joined the Paris Climate Deal – Which Could be Bad News for Donald Trump*, WASH. POST (Sept. 3, 2016), [https://www.washingtonpost.com/news/energy-environment/wp/2016/09/03/u-s-and-china-just-ratified-the-paris-climate-agreement-which-could-be-bad-news-for-donald-trump/?utm\\_term=.2a686411c5d1](https://www.washingtonpost.com/news/energy-environment/wp/2016/09/03/u-s-and-china-just-ratified-the-paris-climate-agreement-which-could-be-bad-news-for-donald-trump/?utm_term=.2a686411c5d1) [https://perma.cc/3D2W-TS2H] (noting that Donald Trump promised to withdraw from the Paris Climate Agreement).

<sup>3</sup> See Office of the Press Secretary, *Remarks by the President in Announcing the Clean Power Plan*, WHITE HOUSE (Aug. 3, 2015), <https://www.whitehouse.gov/the-press-office/2015/08/03/remarks-president-announcing-clean-power-plan> [https://perma.cc/7R2G-JD8U] (announcing the Clean Power Plan).

<sup>4</sup> See Zoë Schlanger, *Does the Clean Power Plan Still Stand a Chance? Only if the Next President Is a Democrat*, NEWSWEEK (Feb. 10, 2016), <http://www.newsweek.com/does-clean-power-plan-still-stand-chance-it-depends-who-we-elect-425114> [https://perma.cc/8Z6W-Z6F3] (recognizing that the future of the Clean Power Plan will be determined by the 2016 presidential election). See also EPA, *Clean Energy Incentive Program*, U.S. ENVTL. PROTECTION AGENCY (June 7, 2017), <https://www.epa.gov/cleanpowerplan/clean-energy-incentive-program> [https://perma.cc/9QRC-7C2H] (explaining the Clean Power Plan's Clean Energy Incentive Program).

<sup>5</sup> See *infra* Parts II–IV (describing the status of the Paris Commitments, Clean Power Plan (CPP) and the Clean Energy Incentive Program (CEIP) as of January 20, 2017).

August 2015 and promulgated in October 2015, and withdraw the Clean Energy Incentive Program Proposed Rule published in June 2016.<sup>6</sup>

## II. THE PARIS COMMITMENTS, CLEAN POWER PLAN, AND CLEAN ENERGY INCENTIVE PROGRAM: STATUS IMMEDIATELY PRIOR TO THE NOVEMBER 2016 PRESIDENTIAL ELECTION

On December 12, 2015, The White House Press Office announced that President Barack Obama had joined with the leaders of over 190 other nations in signing on behalf of the United States the historic Paris Agreement to Combat Climate Change.<sup>7</sup> According to the White House, the Agreement established “a long term, durable global framework to reduce global greenhouse gas emissions.”<sup>8</sup> Most notably, all of the signatory nations had agreed, for the first time, “to putting forward successive and ambitious, nationally-determined climate targets and reporting on their progress towards them using a rigorous, standardized process of review.”<sup>9</sup>

In announcing on August 3, 2015, his Administration’s intent to promulgate and implement the CPP in anticipation of the Paris Conference, President Obama called the Plan “the single most important step America has ever taken in the fight against global climate change.”<sup>10</sup> The President highlighted the purposes and provisions of the Plan in these words:

Here’s how it works: over the next few years, each State will have the [chance] to put together its own plan for reducing emissions[,] because every State has a different energy mix. Some generate more of their power from renewables; some from natural gas, or nuclear, or coal.

And this plan reflects the fact that not everybody is starting in the same place. So we’re giving states the time

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<sup>6</sup> See *infra* Parts V–VI (detailing the actions taken by the Trump Administration and the federal courts regarding the Paris Commitments, the CPP, and the CEIP from January 20 through June 30, 2017).

<sup>7</sup> See Office of the Press Secretary, *U.S. Leadership and the Historic Paris Agreement to Combat Climate Change*, WHITE HOUSE (Dec. 12, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/12/12/us-leadership-and-historic-paris-agreement-combat-climate-change> [<https://perma.cc/7B5X-D7WU>] (introducing the United States’ commitment to combat global climate change).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Office of the Press Secretary, *supra* note 3.

and the flexibility they need to cut pollution in a way that works for them.

And we'll reward the states that take action sooner instead of later[,] because time is not on our side here. As states work to meet their targets, they can build on the progress that our communities and businesses are already making.

A lot of power companies have already begun modernizing their plants, reducing their emissions[,] and[,] by the way, creating new jobs in the process. Nearly a dozen states have already set up their own market-based programs to reduce carbon pollution. About half of our states have set energy efficiency targets. More than [thirty-five] have set renewable energy targets. Over 1,000 mayors have signed an agreement to cut carbon pollution in their cities. And last week, [thirteen] of our biggest companies, including UPS and Walmart and GM, made bold, new commitments to cut their emissions and deploy more clean energy.

So the idea of setting standards and cutting carbon pollution is not new. It's not radical. What is new is that, starting today, Washington is starting to catch up with the vision of the rest of the country. And by setting these standards, we can actually speed up our transition to a cleaner, safer future.

With this Clean Power Plan, by 2030, carbon pollution from our power plants will be [thirty-two] percent lower than it was a decade ago. And the nerdier way to say that is that we'll be keeping 870 million tons of carbon dioxide pollution out of our atmosphere. The simpler, layman's way of saying that is it's like cutting every ounce of emission due to electricity from 108 million American homes. Or it's the equivalent of taking 166 million cars off the road.

By 2030, we will reduce premature deaths from power plant emissions by nearly [ninety] percent[,] and thanks to this plan, there will be 90,000 fewer asthma attacks among our children each year. And by combining this

with greater investment in our booming clean energy sector and smarter investments in energy efficiency and by working with the world to achieve a climate agreement by the end of this year, we can do more to slow, and maybe even eventually stop, the carbon pollution that's doing so much harm to our climate.<sup>11</sup>

In conjunction with the President's announcement of the CPP, EPA Administrator Regina "Gina" McCarthy commented, "[w]e're proud to finalize our historic Clean Power Plan. It will give our kids and grandkids the cleaner, safer future they deserve. The United States is leading by example today, showing the world that climate action is an incredible economic opportunity to build a stronger foundation for growth."<sup>12</sup> The EPA also told the public and media:

The Clean Power Plan accelerates the transition to a clean energy future, which is happening even faster than expected—which means carbon and air pollution are already decreasing, improving public health year by year. By 2030, the plan will cut carbon pollution from the power sector by nearly a third and additional reductions will come from pollutants that can create dangerous soot and smog, translating to significant health benefits for the American people. By 2030, emissions of sulfur dioxide from power plants will be [ninety] percent lower and emissions of nitrogen oxides will be [seventy-two] percent lower, compared to 2005 levels. Americans will avoid up to 90,000 asthma attacks and spend up to 300,000 more days in the office or the classroom, instead of sick at home. And up to 3,600 families will be spared the grief of losing a loved one too soon . . . .

EPA's plan reflects unprecedented public input, including more than 4.3 million public comments on the proposal, and hundreds of meetings with stakeholders. It works by building on strategies states and businesses are already using. Today, the United States uses three times

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<sup>11</sup> Office of the Press Secretary, *supra* note 3.

<sup>12</sup> EPA, *Obama Administration Takes Historic Action on Climate Change/Clean Power Plan to Protect Public Health, Spur Clean Energy Investments and Strengthen U.S. Leadership*, U.S. ENVTL. PROTECTION AGENCY (Aug. 3, 2015), <https://www.epa.gov/newsreleases/obama-administration-takes-historic-action-climate-changedclean-power-plan-protect> [<https://perma.cc/B7WC-PYLT>].

more wind and [twenty] times more solar energy than it did in 2009, and the solar industry added jobs [ten] times faster than the rest of the economy. It safeguards energy reliability by setting common-sense, achievable state-by-state goals that build on a rapidly growing clean energy economy and gives states and utilities the time and flexibility they need to meet their goals.

The final rule establishes guidelines for states to follow in developing and implementing their plans, including requirements that vulnerable communities have a seat at the table with other stakeholders. EPA is proposing a model rule states can adopt, as well as a federal plan that the EPA will put in place if a state fails to submit an adequate plan. Both the proposed model rule and federal plan focus on emissions trading mechanisms to make sure utilities have broad flexibility to reach their carbon pollution reduction goals. EPA also finalized standards to limit carbon pollution from new, modified[,] and reconstructed power plants.<sup>13</sup>

In a fact sheet accompanying its CPP media release, the EPA also highlighted specific public benefits it expected to be realized from including the CEIP in the CPP:

- Encourage the widespread development and deployment of wind and solar, which is essential to longer term clean energy and climate strategies and consistent with the Clean Air Act's directive to advance newer technologies.
- Jumpstart job gains that are anticipated from construction and installation of Renewable Energy (RE) and Energy Efficiency (EE) projects under the CPP.
- Provide incentives to follow through on planned investments in zero-emitting wind and solar power in advance of the CPP's first performance period.
- Provide near term health benefits from reductions in sulfur dioxide, particulates, and nitrogen oxides.
- Level the playing field for implementing energy efficiency in low-income communities, which has been historically limited

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<sup>13</sup> *Id.*

by economic barriers, bringing jobs and lower energy costs to consumers in those areas.<sup>14</sup>

Subsequently, in the final CPP published in the Federal Register on October 23, 2015, the EPA incorporated the CEIP as an optional program that states could use to incentivize early investments in RE generation, as well as in EE measures in low-income communities.<sup>15</sup> In the final CPP, the agency laid out the critical parameters of the CEIP and stated that it would undertake additional public and stakeholder engagements and seek input from these groups before fully developing the specific details related to the design and implementation of the program.<sup>16</sup> In its proposed Federal Plan and Model Rules, the EPA solicited comments on a number of issues related to implementation of the CEIP.<sup>17</sup> In addition to the formal public comment period on the Federal Plan and Model Rules, the EPA also conducted outreach to and engagement of interested parties in several ways in the months following promulgation of the CPP.<sup>18</sup>

Based on this extensive research, outreach, and input, the EPA published its proposed CEIP in the Federal Register on June 30, 2016, modifying in several key respects the Program's general parameters as described in the CPP and also elaborating on its specific programmatic

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<sup>14</sup> Fact Sheet, *The Clean Power Plan – Clean Energy Incentive Program*, U.S. ENVTL. PROTECTION AGENCY (Aug. 2, 2015), <https://www.epa.gov/sites/production/files/2015-08/documents/fs-cpp-ceip.pdf> [<https://perma.cc/3BLN-423Y>].

<sup>15</sup> See Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,829–30 (Oct. 23, 2015) (codified at 40 C.F.R. pt. 60) (recognizing that the CEIP was established to incentivize investment in renewable energy ("RE") and energy efficient ("EE") ventures, which target low-income communities). See also JONATHAN L. RAMSEUR & JAMES E. MCCARTHY, CONG. RESEARCH SERV., R44145, EPA'S CLEAN POWER PLAN: HIGHLIGHTS OF THE FINAL RULE 10 (2016) (highlighting CEIP's key role jump starting CO<sub>2</sub> emissions reductions ahead of the CPP's planned 2022 implementation).

<sup>16</sup> See Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, *supra* note 15, at 64,830 (outlining measures the agency would take to properly develop the program).

<sup>17</sup> See *Clean Energy Incentive Program (CEIP) Design and Implementation Rule*, REGULATIONS.GOV (Nov. 1, 2016), <https://www.regulations.gov/docket?D=EPA-HQ-OAR-2016-0033> [<https://perma.cc/S5BB-UB8S>] (noting that the Environmental Protection Agency (EPA) solicited comments on CEIP implementation). See also Federal Plan Requirements for Greenhouse Gas Emissions from Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations, Proposed Rule, 80 Fed. Reg. 64,966, 64,978, 65,000–01 & 65,025–26 (proposed Oct. 23, 2015) (to be codified at 40 C.F.R. pts. 60, 62, 78) (soliciting comments on Federal Plan and Model Rules generally and describing the CEIP and outlining how it would be incorporated in rate-based and mass-based plans specifically).

<sup>18</sup> See Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, *supra* note 15, at 64,663, 64,672 (noting the extensive outreach and engagement undertaken and the millions of comments received following publication of the proposed CPP rule).



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design in considerably more detail.<sup>19</sup> Most notably, the EPA included hydropower and geothermal, along with solar and wind, as CEIP-eligible RE technologies and added solar projects to energy efficiency measures as CEIP-eligible actions in low-income communities.<sup>20</sup>

The central purpose of the CEIP as originally proposed by the Obama Administration was to incentivize early investments in wind and solar RE generation generally, as well as in solar and demand-side EE projects implemented in low-income communities particularly, to generate carbon-free megawatt hours (MWh) or reduce end-use energy demand during 2020 and/or 2021, the two years immediately preceding the CPP compliance period of 2022–2030.<sup>21</sup> Although state participation in the CEIP was optional, a state opting to participate in the CEIP was required to make a (non-binding) statement of its intent to participate in its initial CPP submittal to the EPA.<sup>22</sup>

To achieve the central purpose of the CEIP, states were enabled and encouraged to award project sponsors early action allowances, if implementing under the CPP a mass-based trading program, or early action emission rate credits (ERCs), if implementing a rate-based trading program.<sup>23</sup> The EPA would provide matching allowances or ERCs up to a national total equivalent to 300 million short tons of CO<sub>2</sub> emissions.<sup>24</sup> The matching allowances or ERCs awarded for eligible early clean energy actions would be doubled for qualifying projects in low-income communities.<sup>25</sup> Eligibility was limited to projects that would commence commercial operation on or after January 1, 2020, (in the case of wind, solar, hydropower, and geothermal) or commence operations on or after September 6, 2018 (in the case of low-income EE).<sup>26</sup>

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<sup>19</sup> See Clean Energy Incentive Program Design Details; Proposed Rule, 81 Fed. Reg. 42,940 (proposed June 30, 2016) (to be codified at 40 C.F.R. pt. 60, 62) (publishing the CEIP proposed rule).

<sup>20</sup> See *id.* at 42,965 (explaining that the EPA expanded CEIP to include geothermal and hydropower technologies).

<sup>21</sup> See *id.* at 42,942 (outlining CEIP's purpose of promoting early investment in wind, solar, and demand-reduction technologies). See also RAMSEUR & MCCARTHY, *supra* note 15, at 10–11 (recognizing the CEIP's role as incentivizing pre-2022 solar and energy efficiency investment in low income communities, among other goals).

<sup>22</sup> See Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, *supra* note 16, at 64,669 (articulating the requirements for state participation in the CEIP).

<sup>23</sup> See Clean Energy Incentive Program Design Details, *supra* note 19, at 42,943 (discussing CEIP's role in allowing states to award "early action" incentives).

<sup>24</sup> See *id.* (setting the aggregate amounts of the matching allowances).

<sup>25</sup> See *id.* (providing a two-to-one award for qualifying low-income projects).

<sup>26</sup> See *id.* at 42,964 (correcting terminology and revising dates for project eligibility).

### III. OBAMA ADMINISTRATION ACTIONS RE: CPP AND CEIP FROM NOVEMBER 1, 2016, THROUGH JANUARY 20, 2017

The EPA received a multitude of comments on the CEIP Proposed Rule through an extended comment period deadline of November 1, 2016.<sup>27</sup> Commenters included representatives of many different important interest groups, states and municipalities, electric utilities, trade associations, clean energy and environmental organizations, and others.<sup>28</sup> Among the key comments received by the agency were the following:

- “The National Association of Manufacturers, the U.S. Chamber of Commerce, the American Petroleum Institute and eight other trade groups urged the EPA to suspend work on the CEIP until legal challenges to the CPP were over.”<sup>29</sup> If the Agency nonetheless proceeded with the CEIP, the business associations requested that “key changes be made in the proposed rule, such as providing ‘additional flexibility’ in meeting greenhouse gas targets, rather than picking ‘winners and losers’ among available technologies.”<sup>30</sup>
- The Utility Air Research Group (UARG), among other commenters, challenged the legality of the CEIP program details being proposed separately from and subsequently to the CPP when the program concept and key parameters had been included in the CPP.<sup>31</sup> These commenters thus contended that the CEIP should be re-proposed in its entirety once the legality of the

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<sup>27</sup> See *Clean Energy Incentive Program (CEIP) Design and Implementation Rule*, *supra* note 17 (documenting 512 public comments submitted on or about Nov. 1, 2016, on numerous issues pertaining to the proposed CEIP provisions).

<sup>28</sup> See *CEIP Comments Roll In*, INSIDE EPA (Nov. 3, 2016), <https://insideepa.com/daily-feed/documents-ceip-comments-roll> [<https://perma.cc/66JS-SFGE>] (sampling and categorizing comments received and posted through Nov. 3, 2016).

<sup>29</sup> Stan Parker, *Trade Groups Call For Halt To EPA Clean Energy Incentives*, LAW360 (Nov. 3, 2016), <https://www.law360.com/articles/858930/trade-groups-call-for-halt-to-epa-clean-energy-incentives> [<https://perma.cc/L2RT-US5B>] (reporting major business groups’ comments critical of the CEIP).

<sup>30</sup> *Id.*

<sup>31</sup> See Abby Smith, *Citing Stay, Procedural Defects, ESPS Opponents Seek CEIP Re-Proposal*, INSIDE EPA DAILY REPORT (Nov. 08, 2016), <https://insideepa.com/daily-news/citing-stay-procedural-defects-esps-opponents-seek-ceip-re-proposal> [<https://perma.cc/P87N-2BKD>] (reporting major utility groups’ comments critical of the CEIP).

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underlying CPP had been finally determined by the federal courts.<sup>32</sup>

- A coalition of 31 states and state agencies, led by West Virginia, offered a similar critique, filing comments "under protest to formally register their continued belief" that the supplemental CEIP rulemaking violated the Supreme Court stay of the CPP.<sup>33</sup>
- Sixty-one clean energy and green groups, city leaders, academics and others generally supportive of the CEIP asked EPA to increase incentives for "early action" energy efficiency investments to the same level as those proposed for renewable investments, i.e., to extend the CEIP's proposed 1:1 matching of allowances and ERCs for renewable investments to energy efficiency projects.<sup>34</sup>
- In one of the sharpest disagreements among CEIP proponents, environmental and clean energy groups divided over whether EPA should alter the Program to account for the impact of renewable energy tax credit extensions.<sup>35</sup> Some groups sided with states and industry that opposed any kind of restriction on eligibility for EPA's CEIP credits, while other groups sought to restrict renewables projects that receive tax incentives from earning EPA credits.<sup>36</sup>

The results of the November 8, 2016 Presidential election and the visceral hostility of President-elect Trump to all matters relating to climate change and CO<sub>2</sub> reduction and regulation presented the EPA with several

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<sup>32</sup> See *id.* (noting the contrary opinions). See also Cecilia Martinez, *Environmental Justice and The Clean Power Plan: The Case of Energy Efficiency*, ENVTL. L. & POL'Y REV. 605, 606, 608 (2017) (outlining environmental justice issues).

<sup>33</sup> Smith, *supra* note 31.

<sup>34</sup> See Jacqueline Toth, *Coalition Asks EPA to Match Awards for State Energy Efficiency Projects*, ROLL CALL, Oct. 26, 2016, 2016 WL 6275198 (reporting comments supportive of CEIP generally but seeking modification of its incentive structure to achieve parity between energy efficiency and renewables). See also Cecilia Martinez, *Environmental Justice and the Clean Power Plan: The Case of Energy Efficiency*, 41 WM. & MARY ENVTL. L. & POL'Y REV. 605, 606, 608 (Spring 2017) (explaining in detail the interrelationship among energy efficiency, greenhouse gas reduction, the CEIP, and environmental justice).

<sup>35</sup> See Abby Smith, *Advocates Split On Adjusting CEIP To Account For Extended Tax Credits*, INSIDE EPA/CLIMATE, Nov. 4, 2016, 2016 WLNR 33810784 (reporting in detail the split among environmental and clean energy advocacy groups over allowing or restricting CEIP project incentive eligibility based on tax credit eligibility).

<sup>36</sup> See Annalee Grant, *Carbon Rule Early Action Plan Creates ITC/PTC Dilemma*, PLATT'S ENERGY TRADER, Nov. 4, 2016, 2016 WLNR 35386063 (reporting equity vs. effectiveness dilemma of projects claiming tax credits earlier, CEIP incentives later, or both).

challenges regarding its regulatory priorities for the CPP and CEIP during the remaining three months of President Obama's term, including but not limited to addressing in a final rule the multitude of CEIP comments filed in late October and early November.<sup>37</sup> In the end, the remaining time was assessed by EPA to be too short to prepare and promulgate a final CEIP rule.<sup>38</sup> However, EPA determined there would be a benefit in preparing a final model trading rule which, even if not promulgated, could be made public to provide guidance to the numerous states interested in pursuing climate action and greenhouse gas emissions credit trading even without the CPP in force and effect.<sup>39</sup> The Obama Administration's Fall 2016 Regulatory Agenda thus addressed these challenges by calling for expedited action by year-end 2016 to complete and make public (but not promulgate) model trading rules as well as deferral of a final CEIP rule to an indefinite time in 2017.<sup>40</sup>

#### IV. FEDERAL COURT ACTIONS RE: CIP AND CPP FROM NOVEMBER 1, 2016, THROUGH JANUARY 20, 2017

Oral argument regarding the pending legal challenges to the CPP was conducted before the D.C. Circuit Court of Appeals sitting *en banc* on September 27, 2016.<sup>41</sup> However, the Court of Appeals issued no order, opinion or other ruling deciding these challenges prior to the completion of President Barack Obama's second term and the inauguration of President Donald Trump on January 20, 2017.<sup>42</sup>

In the days leading up to the oral argument before the D.C. Circuit, both proponents and opponents of the CPP had expressed "strong optimism" regarding the result they expected when the court decided the

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<sup>37</sup> See Annalee Grant, *Obama Administration Lays Out EPA Priorities For Last Weeks of Presidency*, SNL POWER POL'Y WK., Nov. 23, 2016, 2016 WLNR 36112499 (reporting EPA's choices regarding regulatory priorities given the Trump election victory and the short time remaining in President Obama's second term).

<sup>38</sup> See *id.* (reporting deferral of a CEIP final rule to an indeterminate date in 2017).

<sup>39</sup> See *id.* (reporting EPA choice to make public model trading rule even though there was insufficient time to promulgate it before President Obama's second term expired).

<sup>40</sup> See Hannah Hess, *Obama Blueprint Aims to Cement His Regulatory Legacy*, GREENWIRE (Nov. 18, 2016), <https://www.eenews.net/greenwire/stories/1060046034> [<https://perma.cc/8WTM-H7HN>] (reporting EPA's choices regarding priorities included in Obama Administration's Fall 2016 Unified Regulatory Agenda).

<sup>41</sup> See Courtroom Mins. of Oral Argument, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Sept. 27, 2016), ECF No. 1637882 (documenting that oral argument was held as scheduled on Sept. 27, 2016).

<sup>42</sup> See entries and other filings, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Sept. 27, 2016 thru Jan. 20, 2017), ECF Nos. 1638287-1656543 (documenting that the court issued no order deciding the merits of the case between oral argument on September 27, 2016 and the inauguration of the Trump Administration on Jan. 20, 2017).

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case.<sup>43</sup> After oral argument, law professors and other attorneys following but not participating in the case had generally perceived that proponents of the Clean Power Plan had fared better than opponents in the oral argument and expected the court to uphold the EPA rule.<sup>44</sup> But, these perceptions and expectations changed dramatically when Republican candidate Donald Trump defeated Democratic candidate Hillary Clinton in the Presidential election held on November 8, 2016.<sup>45</sup> Indeed, the 2016 Presidential election outcome literally “rocked” and “shocked” the environmental and energy law and policy world.<sup>46</sup>

Specifically, the consensus perceptions were that President-elect Trump was viscerally opposed to all aspects of the Obama Administration’s Climate Action Plan and, thus, once inaugurated, President Trump would cancel the Paris Commitments, his Administration would cease defending in court the CPP and other climate-related rules being challenged in pending litigation, and his new EPA Administrator would act quickly to revoke the CPP and other final rules and withdraw the CEIP and other proposed rules.<sup>47</sup> In short, “Hillary Clinton planned to finish what President Obama started on executive climate action. Trump’s plan is to end it as quickly as possible.”<sup>48</sup>

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<sup>43</sup> See Dawn Reeves, *Ahead of D.C. Circuit Arguments in ESPS Suit, Both Sides Express Optimism*, INSIDE EPA (Sept. 22, 2016), <https://insideepa.com/daily-news/ahead-dc-circuit-arguments-esps-suit-both-sides-express-optimism> [https://perma.cc/S6JN-K2DC] (reporting that both proponents and opponents of the CPP expressed “strong optimism” prior to oral argument).

<sup>44</sup> See Lee Logan & Dawn Reeves, *After Arguments, Analysts Agree EPA Has Advantage In ESPS Litigation*, INSIDE EPA (Oct. 3, 2016), <https://insideepa.com/daily-news/after-arguments-analysts-agree-epa-has-advantage-esps-litigation>. [https://perma.cc/7Y62-BZ33] (speculating on outcomes to the case).

<sup>45</sup> See, e.g., Stephen Lacy, *It’s ‘Virtually Certain’ That Trump Dismantles Obama’s Climate Action Plan, Say Experts*, GREENTECH MEDIA (Nov. 9, 2016), <https://www.greentechmedia.com/articles/read/its-virtually-certain-that-trump-will-try-to-dismantle-obamas-climate-plan> [https://perma.cc/K48E-V5WZ] (signaling a shift in climate change policy due to new political leadership).

<sup>46</sup> See Robin Bravender, *Energy World Rocked by Trump’s Win*, E&E NEWS REPORTER (Nov. 9, 2016), <http://www.eenews.net/stories/1060045475> [https://perma.cc/2U3D-X7MR] (reporting reactions after the 2016 presidential election).

<sup>47</sup> See, e.g., Lacy, *supra* note 45 (predicting an end to progressive energy policies implemented during the Obama presidency). See also Bravender, *supra* note 46 (reporting the glum prognosis of many environmental activists after the Trump victory); *How Trump Can Undo Power Plan and Paris and Navigate Endangerment Finding*, E&E-TV ONPOINT, aired Dec. 12, 2016, <https://www.eenews.net/tv/videos/2186/transcript> [https://perma.cc/AGR6-4CMR] (citing to the available transcript).

<sup>48</sup> Lacy, *supra* note 45.

## V. TRUMP ADMINISTRATION ACTIONS RE: PARIS COMMITMENTS, CPP AND CEIP FROM JANUARY 20 THROUGH JUNE 30, 2017

The newly-inaugurated Trump Administration rapidly confirmed the dramatically changed perceptions and expectations of the environmental and energy law and policy world regarding the Paris Commitments, the CPP, and the CEIP.<sup>49</sup> On March 28, 2017, President Trump signed Executive Order No. 13,783, entitled Promoting Energy Independence and Economic Growth.<sup>50</sup> This Executive Order directed “[t]he heads of agencies shall review all existing regulations, orders, guidance documents, policies, and any other similar agency actions (collectively, agency actions) that potentially burden the development or use of domestically-produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources.”<sup>51</sup> In addition, the Order expressly provided:

**Sec. 3. Rescission of Certain Energy and Climate-Related Presidential and Regulatory Actions.**

(a) The following Presidential actions are hereby revoked:

(i) Executive Order 13,653 of November 1, 2013 (Preparing the United States for the Impacts of Climate Change);

(ii) The Presidential Memorandum of June 25, 2013 (Power Sector Carbon Pollution Standards);

(iii) The Presidential Memorandum of November 3, 2015 (Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment); and

(iv) The Presidential Memorandum of September 21, 2016 (Climate Change and National Security).

(b) The following reports shall be rescinded:

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<sup>49</sup> See *infra* Part V (the Trump Administration’s actions for the first half of 2017).

<sup>50</sup> See Exec. Order No. 13,783, 82 Fed. Reg. 16,093 (Mar. 31, 2017) (promulgating the executive order).

<sup>51</sup> *Id.*

(i) The Report of the Executive Office of the President of June 2013 (The President's Climate Action Plan); and

(ii) The Report of the Executive Office of the President of March 2014 (Climate Action Plan Strategy to Reduce Methane Emissions).

(c) The Council on Environmental Quality shall rescind its final guidance entitled "Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews," which is referred to in "Notice of Availability," 81 Fed. Reg. 51,866 (August 5, 2016).

(d) The heads of all agencies shall identify existing agency actions related to or arising from the Presidential actions listed in subsection (a) of this section, the reports listed in subsection (b) of this section, or the final guidance listed in subsection (c) of this section. Each agency shall, as soon as practicable, suspend, revise, or rescind, or publish for notice and comment proposed rules suspending, revising, or rescinding any such actions, as appropriate and consistent with law and with the policies set forth in section 1 of this order.<sup>52</sup>

Even more specifically, the Order also expressly directed:

**Sec. 4.** Review of the Environmental Protection Agency's "Clean Power Plan" and Related Rules and Agency Actions.

(a) The Administrator of the Environmental Protection Agency (Administrator) shall immediately take all steps necessary to review the final rules set forth in subsections (b)(i) and (b)(ii) of this section, and any rules and guidance issued pursuant to them, for consistency with the policy set forth in section 1 of this order and, if appropriate, shall, as soon as practicable, suspend, revise, or rescind the guidance, or publish for notice and comment proposed rules suspending, revising, or

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<sup>52</sup> *Id.* at 16,094.

rescinding those rules. In addition, the Administrator shall immediately take all steps necessary to review the proposed rule set forth in subsection (b)(iii) of this section, and, if appropriate, shall, as soon as practicable, determine whether to revise or withdraw the proposed rule.

(b) This section applies to the following final or proposed rules:

(i) The final rule entitled “Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units,” 80 Fed. Reg. 64,661 (October 23, 2015) (Clean Power Plan);

(ii) The final rule entitled “Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units,” 80 Fed. Reg. 64,509 (October 23, 2015); and

(iii) The proposed rule entitled “Federal Plan Requirements for Greenhouse Gas Emissions From Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations; Proposed Rule,” 80 Fed. Reg. 64,966 (October 23, 2015).

(c) The Administrator shall review and, if appropriate, as soon as practicable, take lawful action to suspend, revise, or rescind, as appropriate and consistent with law, the “Legal Memorandum Accompanying Clean Power Plan for Certain Issues,” which was published in conjunction with the Clean Power Plan.

(d) The Administrator shall promptly notify the Attorney General of any actions taken by the Administrator pursuant to this order related to the rules identified in subsection (b) of this section so that the Attorney General may, as appropriate, provide notice of this order and any such action to any court with jurisdiction over pending litigation related to those rules, and may, in his discretion, request that the court stay the litigation or otherwise delay further litigation, or seek other appropriate relief



consistent with this order, pending the completion of the administrative actions described in subsection (a) of this section.<sup>53</sup>

President Trump publicly signed Executive Order 13,783 “with great fanfare” in the EPA’s Map Room.<sup>54</sup> According to the *Washington Post*, the President’s issuance of the Order represented “the most significant step yet in obliterating his predecessor’s environmental record, instructing federal regulators to rewrite key rules curbing U.S. carbon emissions.”<sup>55</sup>

Immediately following the President’s signing of the Order on March 28, 2017, the EPA issued a news release announcing that the Agency would be reviewing the Clean Power Plan as directed in the Order.<sup>56</sup> According to this news release:

The Energy Independence Executive Order directs agencies responsible for regulating domestic energy production to submit plans to the White House, which will identify, and propose measures to revise or rescind, regulatory barriers that impede progress towards energy independence. Moreover, the Order rescinds several Obama executive orders and policies related to climate change. It also directs the Administrator of the Environmental Protection Agency and the Secretary of the Interior to review, and if necessary, revise or rescind, several regulations that may place unnecessary, costly burdens on coal-fired electric utilities, coal miners, and oil and gas producers.<sup>57</sup>

That same day, EPA Administrator Scott Pruitt signed a Notice (published in the Federal Register on April 4, 2017) which officially announced that the Agency would be “reviewing and, if appropriate, will

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<sup>53</sup> *Id.* at 16,095.

<sup>54</sup> See Juliet Eilperin & Brady Dennis, *Trump Moves Decisively to Wipe Out Obama’s Climate-Change Record*, WASH. POST (Mar. 28, 2017), [https://www.washingtonpost.com/national/health-science/trump-moves-decisively-to-wipe-out-obamasclimate-change-record/2017/03/27/411043d4-132c-11e7-9e4f-09aa75d3ec57\\_story.html?tid=a\\_inl&utm\\_term=.87c1319e949c](https://www.washingtonpost.com/national/health-science/trump-moves-decisively-to-wipe-out-obamasclimate-change-record/2017/03/27/411043d4-132c-11e7-9e4f-09aa75d3ec57_story.html?tid=a_inl&utm_term=.87c1319e949c) [<https://perma.cc/P4H4-3CRL>] (emphasizing the enthusiasm of the Trump Administration for suspending, revising or rescinding the CPP).

<sup>55</sup> *Id.*

<sup>56</sup> See EPA, *EPA to Review the Clean Power Plan Under President Trump’s Executive Order*, U.S. ENV’T L. PROT. AGENCY (Mar. 28, 2017), <https://www.epa.gov/newsreleases/epa-review-clean-power-plan-under-president-trumps-executive-order> [<https://perma.cc/3YK2-5AU5>] (detailing the EPA’s new direction under the Trump Administration).

<sup>57</sup> *Id.*

initiate proceedings to suspend, revise or rescind the Clean Power Plan.”<sup>58</sup> This Notice stated, “[b]y this notice, EPA announces it is reviewing the Clean Power Plan, 80 FR 64,662 (October 23, 2015) (CPP), including the accompanying Legal Memorandum, and, if appropriate, will as soon as practicable and consistent with law, initiate proceedings to suspend, revise or rescind this rule.”<sup>59</sup> The Notice explained the basis for the announced review as follows:

On March 28, 2017, President Trump issued an Executive Order establishing a national policy in favor of energy independence, economic growth, and the rule of law. The purpose of that Executive Order is to facilitate the development of U.S. energy resources – including oil and gas – and to reduce unnecessary regulatory burdens associated with the development of those resources. The President has directed agencies to review existing regulations that potentially burden the development of domestic energy resources, and appropriately suspend, revise, or rescind regulations that unduly burden the development of U.S. energy resources beyond what is necessary to protect the public interest or otherwise comply with the law. The Executive Order also directs agencies to take appropriate actions, to the extent permitted by law, to promote clean air and clean water while also respecting the proper roles of Congress and the States. This Executive Order specifically directs EPA to review and, if appropriate, initiate reconsideration proceedings to suspend, revise or rescind this Rule, including the accompanying Legal Memorandum.

Pursuant to the Executive Order, EPA is initiating its review of the CPP, including the accompanying legal memorandum, and providing advanced notice of forthcoming rulemaking proceedings consistent with the President’s policies. If EPA’s review concludes that suspension, revision or rescission of this Rule may be appropriate, EPA’s review will be followed by a rulemaking process that will be transparent, follow proper administrative procedures, include appropriate

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<sup>58</sup> Review of the Clean Power Plan, 82 Fed. Reg. 16,329 (announced Apr. 4, 2017) (to be codified at 40 C.F.R. Part 60).

<sup>59</sup> *Id.*

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engagement with the public, employ sound science, and be firmly grounded in the law.<sup>60</sup>

Also on March 28, 2017, Administrator Pruitt signed a Notice (published in the Federal Register on April 3, 2017) withdrawing the proposed rule which the Obama EPA had published on June 30, 2016, to define the key design details of the CEIP.<sup>61</sup> This Notice expressly stated:

The proposed rule published on October 23, 2015 entitled “Federal Plan Requirements for Greenhouse Gas Emissions From Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations.” 80 FR 64966, and the proposed rule published on June 30, 2016 entitled “Clean Energy Incentive Program Design Details,” 81 FR 42940, are withdrawn as of April 3, 2017.<sup>62</sup>

The Notice also summarized the rationale for withdrawal of the CEIP Design Details Proposed Rule as follows:

The Executive Order directs the EPA to review the October 2015 [Federal Plan] Proposed Rule and, if appropriate, as soon as practicable and consistent with law, consider revising or withdrawing the October 2015 Proposed Rule. In anticipation of the Executive Order, the EPA had already begun a review of both the October 2015 Proposed Rule, and of the CEIP Proposed Rule, which proposes implementation details for a program that is directly connected to the CPP. In light of the policies set forth in the Executive Order and the Agency’s concurrent notice initiating a review of the CPP, EPA has decided to withdraw the Proposed Rules . . . .<sup>63</sup>

One knowledgeable legal commentator characterized these two coordinated actions by the Trump EPA in these straightforward terms:

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<sup>60</sup> *Id.* at 16,329–30.

<sup>61</sup> See Withdrawal of Proposed Rules: Federal Plan Requirements for Greenhouse Gas Emissions From Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations; and Clean Energy Incentive Program Design Details, 82 Fed. Reg. 16,144 (announced Apr. 3, 2017) (to be codified at 40 C.F.R. Part 60) (retracting a previously published proposed rule).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 16,145.

The U.S. Environmental Protection Agency is abandoning two Obama administration proposals related to the Clean Power Plan under President Donald Trump's executive order directing the agency to consider rolling the plan back and to reduce regulatory burdens on domestic energy development, saying the measures may not mesh with its working understanding of its authority.

In a notice slated to be published Monday in the Federal Register, the agency said it is withdrawing both a proposal for a plan to execute greenhouse gas emission guidelines for existing fossil fuel-fired power plants and a proposal to help states and tribes meet the Clean Power Plan's carbon dioxide reduction goals through early investments in renewable energy.

The first proposal, which was floated in October 2015, was not only for a federal plan to implement greenhouse gas emission guidelines at fossil fuel-fired power plants, but for model trading rules meant to provide a sample for states hoping to adopt a trading program to implement the Clean Power Plan and for amendments to certain Clean Air Act framework regulations, according to the notice.

Meanwhile, the second proposal, offered up in June 2016, was for design details for the optional Clean Energy Incentive Program, which states could have used to incentivize renewable energy projects under the Clean Power Plan, which the U.S. Supreme Court has stayed implementation of while the D.C. Circuit considers its fate . . . .<sup>64</sup>

However, Inside EPA saw the withdrawal of the proposed rules by the Trump EPA as having an additional purpose in relation to the litigation pending in the D.C. Circuit Court of Appeals regarding the Obama Administration CPP final rule:

EPA, as it initiates review of its power plant greenhouse gas rules, appears to be hedging against the limited

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<sup>64</sup> Christine Powell, *EPA Yanks CPP-Related Proposals After Trump's Exec. Order*, LAW 360 (Mar. 31, 2017), <https://www.law360.com/articles/908602/epa-yanks-cpp-related-proposals-after-trump-s-exec-order> [<https://perma.cc/49R7-ZB94>].

possibility that a federal appellate court will issue a ruling upholding the existing plant rule – withdrawing several pending proposals for related programs and rules and emphasizing it intends to delay any deadlines that become relevant.<sup>65</sup>

Subsequent actions by the Trump Administration and EPA have tended to confirm Inside EPA's insight that the Agency had multiple reasons for withdrawal of the CEIP Proposed Rule.<sup>66</sup>

First and foremost, of course, was President Trump's long-expected announcement on June 1, 2017, that his Administration would be canceling the Obama Administration's Paris Commitments and withdrawing the United States from the Paris Accords.<sup>67</sup> Specifically, President Trump announced:

The Paris climate accord is simply the latest example of Washington entering an agreement that disadvantages the U.S., leaving American workers who I love and taxpayers to absorb the cost in terms of lost jobs and lower wages and vastly diminished economic production. Thus, as of today, the U.S. will cease all implementation of the non-binding Paris accord and the draconian and financial economic burdens the agreement imposes on our country.

This includes ending the implementation of the Nationally Determined Contribution and, very importantly, the Green Climate Fund . . . .<sup>68</sup>

Notably as well, on June 8, 2017, the EPA sent to the White House Office of Management & Budget (OMB) for interagency review a proposal entitled "Review of the Clean Power Plan."<sup>69</sup> However, the content of this

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<sup>65</sup> Abby Smith, *Hedging Against Court Approval Of CPP, EPA Withdraws Related Proposals*, INSIDE EPA (Mar. 31, 2017), <https://insideepa.com/daily-news/hedging-against-court-approval-cpp-epa-withdraws-related-proposals> [<https://perma.cc/RW94-YBC6>].

<sup>66</sup> See *supra* Part IV and V. See also *infra* Part VI.

<sup>67</sup> See CBS News, *Full Transcript: Trump's Paris climate agreement announcement*, CBS NEWS (June 1, 2017), <http://www.cbsnews.com/news/trump-paris-climate-agreement-withdrawal-announcement-full-transcript> [<https://perma.cc/YS57-CTYY>] (announcing the Trump Administration's top priorities).

<sup>68</sup> *Id.*

<sup>69</sup> See Office of Mgmt & Budget, *Review of the Clean Power Plan*, Office of Info. & Reg. Affairs, REGINFO.GOV (June 8, 2017), <https://www.reginfo.gov/public/do/eoDetails?rrid=127400> [<https://perma.cc/ZSZ7-FZ24>] (disclosing the title but not the substance of the EPA's proposal).

proposal has not been made public and EPA Administrator Scott Pruitt has publicly stated that the ultimate fate of the CPP “had yet to be determined” by the Trump Administration.<sup>70</sup> Thus, even the general nature of this proposed regulatory action regarding the CPP is still officially uncertain.<sup>71</sup>

Nonetheless, the trade press has cited informed sources for several alternative approaches to the substance of this “proposed regulatory action.”<sup>72</sup> While a “repeal and replace” proposal for the CPP is widely considered the most likely possibility, regulated industry attorneys see significant legal risks attending a “repeal first, replace later” strategy by EPA.<sup>73</sup> As a result, it also appears that the “proposed regulatory action” may well “repeal and replace” the CPP at the same time even if the specific nature and content of the “replacement” rule is undecided at present.<sup>74</sup>

Most prominent among the alternatives which the EPA is reportedly considering is a “repeal and replace” proposed rule which would limit CO<sub>2</sub> mitigation measures to those which can be implemented “inside the fence” of existing power plants:

EPA's proposal to scrap the CPP, sent June 8 to the White House for interagency review, is expected to use a key legal critique that the agency's section 111(d) authority only allows it to base targets on actions taken at the power plant facility—or “inside the fence.” Only the [CPP] rule's first “building block,” which called for heat rate

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<sup>70</sup> See Pruitt Hedges on Future Utility GHG Rules Even as EPA Readies CPP Repeal, INSIDE EPA (May 25, 2017), <https://insideepa.com/daily-news/pruitt-hedges-future-utility-ghg-rules-even-epa-readies-cpp-repeal> [<https://perma.cc/4PZV-MC6W>] (noting the uncertainty of the proposal).

<sup>71</sup> See Emily Holden, *Path on Clean Power Plan ‘Yet to be Determined’ – Pruitt*, E&E NEWS (May 24, 2017), <https://www.eenews.net/eenewspm/2017/05/24/stories/1060055102> [<https://perma.cc/4HK6-UUC3>] (reiterating the proposal’s uncertain future).

<sup>72</sup> See, e.g., Abby Smith, *Utility Group Suggests CPP Replacement Plan as EPA Advances Rollback*, INSIDE EPA (June 12, 2017), <https://insideepa.com/daily-news/utility-group-suggests-cpp-replacement-plan-epa-advances-rollback> [<https://perma.cc/YP9W-PYMZ>] (noting that there are alternatives to the proposal). See also *Power Industry to Pruitt: Replace the Clean Power Plan*, INSIDE EPA (June 23, 2017), <https://insideepa.com/daily-feed/power-industry-pruitt-replace-clean-power-plan> [<https://perma.cc/9ZLS-ZAGF>] (describing alternative approaches to the proposal).

<sup>73</sup> Dawn Reeves, *Industry Attorneys See Legal Risks To EPA’s CPP ‘Repeal First’ Strategy*, INSIDE EPA (June 8, 2017), <https://insideepa.com/daily-news/industry-attorneys-see-legal-risks-epas-cpp-repeal-first-strategy> [<https://perma.cc/4QXB-C7YQ>].

<sup>74</sup> Eilperin & Dennis, *supra* note 54; EPA, *supra* note 56.

improvements at power plants, represents such a strategy.<sup>75</sup>

Another report indicates that EPA may be planning to exempt coal plants from greenhouse gas regulations entirely while applying the limited “inside the fence” regulation only to gas plants.<sup>76</sup> Other reports suggest that labor interests aligned with the Trump Administration on relaxing power plant emission regulation are urging the EPA to review and revise existing New Source Review rules for other pollutants simultaneously or concurrently with “repealing and replacing” the CPP.<sup>77</sup> However, none of these reports suggest that the Trump Administration is considering a replacement for the CEIP in any form or fashion.<sup>78</sup>

#### VI. FEDERAL COURT ACTIONS FROM JANUARY 20 THROUGH JUNE 30, 2017

On March 28, 2017, the Trump EPA petitioned the D.C. Circuit to defer indefinitely its ruling on the Obama Administration's CPP Final Rule while the Agency initiated and completed the new rulemaking required to rescind and, potentially, to replace the existing CPP Final Rule.<sup>79</sup> This new rulemaking process is one which knowledgeable observers expect to take years to complete and to spawn complex derivative litigation of its own.<sup>80</sup>

In response, the D.C. Circuit issued an order on April 28, 2017 deferring its decision only for sixty days while requesting the parties to brief the option of the Court remanding the CPP Rule to the EPA for further consideration (rather than either ruling on the fully briefed merits of the case or retaining the case but deferring its ruling on the merits

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<sup>75</sup> Lee Logan, *Environmentalists Make Case For Broader 'Block 1' Power Plant GHG Rule*, INSIDE EPA (July 17, 2017), <https://insideepa.com/daily-news/environmentalists-make-case-broader-block-1-power-plant-ghg-rule> [<http://perma.cc/N99D-DVCJ>].

<sup>76</sup> See Dawn Reeves, *EPA Expected To Cite '112 Exclusion' In CPP Repeal To Exempt Coal Plants*, INSIDE EPA (July 7, 2017), <https://insideepa.com/daily-news/epa-expected-cite-112-exclusion-cpp-repeal-exempt-coal-plants> [<https://perma.cc/Z99T-BXP2>].

<sup>77</sup> See Dawn Reeves, *Unions Urge White House to Include NSR Reform With CPP Replacement*, INSIDE EPA (June 28, 2017), <https://insideepa.com/daily-news/unions-urge-white-house-include-nsr-reform-cpp-replacement> [<https://perma.cc/7A7T-PECH>].

<sup>78</sup> See Eilperin & Brady, *supra* note 54. See also EPA, *supra* note 56; Review of the Clean Power Plan *supra* notes 58–60; Withdrawal of Proposed Rules, *supra* note 61.

<sup>79</sup> See Notice of Executive Order, EPA Review of Clean Power Plan and Forthcoming Rulemaking and Motion to Hold Cases in Abeyance, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Mar. 28, 2017), ECF No. 1668274 (referencing the Trump Administration's intention).

<sup>80</sup> See Jeremy P. Jacobs, *Rescinding Obama Regs? Not So Fast, Legal Scholars Say*, GREENWIRE (Nov. 11, 2016), <https://www.eenews.net/greenwire/stories/1060045632> [<http://perma.cc/52AA-NB2P>] (speculating as to the future of the Plan).

indefinitely as requested by the EPA).<sup>81</sup> In so doing, the Court also requested the EPA to file status reports on its “review” of the CPP every thirty days.<sup>82</sup>

On May 15, 2017, all parties joined in one of six supplemental briefs filed on the issue of remanding the CPP to EPA for further consideration.<sup>83</sup> Basically, the opponents of the CPP (Petitioners and Respondent EPA) submitted supplemental briefs supporting indefinite deferral of a ruling on the merits over both a prompt ruling on the merits or a remand to the Agency.<sup>84</sup> By contrast, the proponents of the CPP (Intervenor Power Companies, Cities and States, Non-Governmental Organizations, and the Renewable and Advanced Energy Associations) submitted supplemental briefs urging the court to issue a prompt ruling on the merits, but failing that, remanding to the Agency rather than indefinitely deferring a ruling while EPA initiated and then proceeded until completion with a proposed rulemaking to “repeal and replace” the existing CPP rule.<sup>85</sup>

On May 30, 2017, EPA filed its first status report with the court, which stated that the Agency “may be prepared” to seek interagency review “in the near future” for a “proposed regulatory action,” but neither established a date nor disclosed the content of such proposed action.<sup>86</sup>

On June 12, 2017, EPA filed a supplemental status report with the court, which advised that the Agency “has begun the interagency review process of a proposed regulatory action resulting from its review of the [CPP] Rule [and] has transmitted a draft proposed rule to the Office of Management and Budget’s Office of Information and Regulatory Affairs.”<sup>87</sup> Once again, the EPA status report did not disclose the

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<sup>81</sup> See Order, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Apr. 28, 2017) ECF No. 1673071 (describing the Court’s decision).

<sup>82</sup> *Id.*

<sup>83</sup> See parties’ six different joint Supplemental Briefs, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. May 15, 2017) ECF Nos. 1675185, 1675194, 1675202, 1675243, 1675250, and 1675252 (pointing out the parties’ varied positions on this issue).

<sup>84</sup> Compare Respondent EPA Supplemental Brief, at 7, ECF No. 1675243, with Petitioners’ Joint Supplemental Brief, at 9, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. May 15, 2017) ECF No. 1675250 (showing the similarity of the positions of CPP opponents).

<sup>85</sup> Compare Intervenor Power Companies Joint Supplemental Brief, at 6, ECF No. 1675185, with Intervenor Cities & States Joint Supplemental Brief, at 14, ECF No. 1675252, and Intervenor Non-Governmental Organizations Joint Supplemental Brief, at 17, ECF No. 1675202, and Intervenor Renewable & Advanced Energy Ass’ns, at 4, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. May 15, 2017) ECF No. 1675194 (showing the similarity of the positions of CPP proponents).

<sup>86</sup> See EPA Status Report, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. May 30, 2017), ECF No. 1677307.

<sup>87</sup> See EPA Supplemental Status Report, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. June 12, 2017) ECF No. 1679311.



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substance of the proposed rule nor establish a date for its completion or publication.<sup>88</sup>

On June 30, 2017, EPA filed another status report with the D.C. Circuit Court, this one providing no additional information regarding its proposed rule relating to the CPP than had been provided in its June 12, 2017 supplemental status report.<sup>89</sup>

As of July 31, 2017, the D.C. Circuit Court has yet to rule either on the merits of the pending CPP litigation or to enter an order indefinitely deferring such a ruling or remanding the CPP Final Rule back to the EPA for further consideration.<sup>90</sup>

## VII. CONCLUSION

The basic concept of the CEIP as a voluntary “early action” component of the CPP was incorporated in the CPP Final Rule promulgated by the Obama EPA on October 23, 2015.<sup>91</sup> There appears to be no question that the Trump Administration does NOT have the legal authority to withdraw summarily or arbitrarily the CPP Final Rule<sup>92</sup>; instead, both legal scholars and practicing attorneys appear to agree that the only way to rescind the CPP is for the Trump EPA to initiate a new rulemaking to

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<sup>88</sup> See *id.* (disclosing neither the substance nor the expected timing of the proposed regulatory action).

<sup>89</sup> See EPA Status Report, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. June 29, 2017), ECF No. 1681936 (also disclosing neither the substance nor the expected timing of the proposed regulatory action).

<sup>90</sup> See entries and other filings, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. June 29–July 27, 2017), ECF Nos. 1682040–1686184 (documenting that the court has yet to issue its order on the merits, remanding to EPA for further consideration of the existing CPP rule or deferring a ruling on the merits pending completion of a new EPA rulemaking to repeal and, potentially, to replace the existing CPP rule).

<sup>91</sup> See Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Final Rule, 80 Fed. Reg. 64,661, 64,943, Oct. 23, 2015 (promulgating concept and key parameters of Clean Energy Incentive Program, codified at 40 C.F.R. 60,5737).

<sup>92</sup> See *Motor Vehicles Mfrs. Ass’n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (holding unanimously that the National Highway Traffic and Safety Administration acted arbitrarily and capriciously in revoking a passenger passive restraint standard previously codified in a final rule when it failed to present an adequate basis and explanation for rescinding the requirement, and thus directing the Court of Appeals to vacate the revocation and remand to the agency with instructions either to consider the matter further or adhere to or amend the standard along lines which its analysis supported). See generally *Judicial Review of Rescission of Rules: A ‘Passive Restraint’ on Deregulation*, 53 GEO. WASH. L. REV. 252 (Nov. 1984) (reviewing judicial decisions relating to agency rescissions of their own rules in a variety of administrative contexts).

repeal and, potentially, to replace it.<sup>93</sup> Indeed, the Trump Administration is now in the very early stages of such a new rulemaking.<sup>94</sup>

Since February 2016, the CPP Final Rule has been stayed by the Supreme Court pending judicial review by the D.C. Circuit Court.<sup>95</sup> Sitting *en banc*, the D.C. Circuit heard oral argument on September 27, 2016, but did not issue an opinion before the Trump Administration took office on January 20, 2017.<sup>96</sup> As a result, it has now become less likely that the D.C. Circuit will rule on the merits of the pending legal challenges to the CPP Final Rule and more likely that it will instead either defer its decision on the merits indefinitely pending further rulemaking by the EPA or remand the Rule to the EPA for further consideration.<sup>97</sup> But, either way, the ultimate fate of the Clean Power Plan remains to be determined at some time in the indefinite future following additional complex administrative and legal proceedings likely to take years.<sup>98</sup>

There appears to be no question that the Trump Administration does have the legal authority to withdraw the CEIP Proposed Rule.<sup>99</sup>

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<sup>93</sup> See Jacobs, *supra* note 80 (discussing judicial review in the specific administrative context of EPA rescission of the CPP).

<sup>94</sup> See *supra* Part IV (describing the ongoing EPA review of the CPP and the initial stages of a new rulemaking to “repeal and replace” it).

<sup>95</sup> See Order Granting Application for Stay, *West Virginia v. EPA*, No. 15-1363 (Feb. 9, 2016), [https://www.edf.org/sites/default/files/content/2016.02.09\\_scotus\\_stay\\_order\\_west\\_virginia.pdf](https://www.edf.org/sites/default/files/content/2016.02.09_scotus_stay_order_west_virginia.pdf) [<https://perma.cc/C73J-K2FZ>] (providing the Supreme Court’s order staying the CPP pending completion of its judicial review).

<sup>96</sup> See *supra* Part IV (describing the transformation in expectations for the future of CPP litigation following oral argument before the D.C. Circuit as a result of the outcome of the 2016 Presidential election).

<sup>97</sup> See Ellen M. Gilmer, *Clean Power Plan: Litigation’s Fate Still Uncertain as Enviro Chart Options*, E&E NEWS (May 1, 2017), <https://www.eenews.net/stories/1060053811> [<https://perma.cc/X8NG-KTA8>] (reporting three alternative future litigation scenarios for CPP).

<sup>98</sup> See *id.* (discussing the uncertain fate of the CPP following the D.C. Circuit Court Order of Apr. 28, 2017).

<sup>99</sup> The administrative contexts for judicial review of the withdrawal of the CEIP and rescission of the CPP are different because the CEIP is a proposed rule while the CPP is a final rule. The federal appellate courts have described the varying levels of deference afforded administrative agency decisions in different contexts in these instructive terms: “[A]n agency’s refusal to institute rulemaking proceedings is at the high end of the range’ of levels of deference we give to agency action under our ‘arbitrary and capricious’ review.” *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 919 (D.C. Cir. 2008) (quoting *Am. Horse Prot. Ass’n, Inc. v. Lyng*, 812 F.2d 1, 4–5 (D.C. Cir. 1987)). In particular, a reviewing federal court “give[s] more deference to an agency’s decision to withdraw a proposed rule than [it] give[s] to a decision to promulgate a new rule or to rescind an existing one.” *Int’l Union, United Mine Workers of Am. v. United States Dept. of Labor*, 358 F.3d 40, 43 (D.C. Cir. 2004). While an agency may not terminate a rulemaking for “no reason whatsoever,” it need only “provide an explanation that will enable the court to evaluate [its] rationale at the time of the decision.” *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990). See also *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (“a reviewing court . . . must judge the

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Moreover, there is no expectation that the Trump EPA will include in its new rulemaking to repeal and, potentially, to replace the CPP any provision for a revised CEIP—quite the contrary.<sup>100</sup> Thus, the inescapable conclusion is that, as a result of the sequence of events described in Sections IV through VI, *supra*, the CEIP has become a casualty of the 2016 Presidential election and the 180-degree shift in policy from the Obama Administration to the Trump Administration regarding Climate Change, CO<sub>2</sub> reduction and regulation, and voluntary “early action” by the States on CO<sub>2</sub> reduction and regulation.

In short, the CEIP is now but an invitation to technological innovation and market transformation in the electric energy industry wisely issued at the direction of the last President of the United States but recklessly withdrawn by order of the present one. May it not rest in peace but instead serve as an inspiration to states, localities, businesses, homeowners, non-governmental organizations, and associations of individuals and enterprises throughout the United States to act together with the rest of the world to reduce CO<sub>2</sub> emissions through a dramatic transition to clean energy, thereby avoiding or at least mitigating for future generations the worst of the climate change scenarios being inexorably defined by the Earth’s astrophysics and forebodingly forecast by the world’s scientists.

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propriety of [agency] action solely by the grounds invoked by the agency,” and “that basis must be set forth with such clarity as to be understandable”). Here, the EPA Notice withdrawing the CEIP unquestionably would receive and meet a highly deferential standard of review (and no interested party has suggested to the contrary). Specifically, EPA set forth its reasoning as follows: (1) at the time of withdrawal, EPA was under no obligation to finalize the CEIP; (2) with the CPP stayed by the Supreme Court, there was no time constraint requiring finalizing the proposed rule; (3) the CEIP is not required by the Clean Air Act but is instead a voluntary program developed by EPA to incentivize “early action” by the States to achieve the emissions reductions goals of the CPP, the substance and timing of which have now been put in doubt by the Supreme Court stay and the litigation now pending in the D.C. Circuit; and (4) the withdrawal was taken in immediate response to a Presidential Executive Order clearly and plainly directing it. *See* 82 Fed. Reg. at 16, 145 (answering the question “Why is the EPA withdrawing the . . . CEIP Proposed Rule?”).

<sup>100</sup> *See supra* Part IV (describing and documenting trade press accounts of alternative directions for the EPA rulemaking to “repeal and replace” the CPP).